**Nurses United for Improved Patient Healthcare, AFT, AFL–CIO *and* VNA Corporation d/b/a Visiting Nurse Services of Health Midwest.** Cases 17–CB–5596 and 17–RC–12040.

March 20, 2003

DECISION, ORDER, AND DIRECTION

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

On July 25, 2002, Administrative Law Judge James L. Rose issued the attached decision. The Respondent/Petitioner and the Charging Party/Employer filed exceptions, supporting briefs, and answering briefs; and the Charging Party/Employer filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

IT IS FURTHER ORDERED that the Charging Party/Employer's objection to conduct affecting the results of the election conducted in Case 17–RC–12040 is overruled.

IT IS FURTHER ORDERED that the challenges to the ballots of Marsha O'Roark, Catherine Burrows, and Patricia Habiger in Case 17–RC–12040 are overruled.

IT IS FURTHER ORDERED that Case 17–RC–12040 is severed from Case 17–CB–5596 and that it is remanded to the Regional Director for Region 17 for action consistent with the Direction below.

DIRECTION

It is directed that the Regional Director for Region 17 shall, within 14 days from the date of this Decision, Order, and Direction open and count the ballots of Marsha O'Roark, Catherine Burrows and Patricia Habiger. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C. March 20, 2003

Peter C. Schaumber, Member

Dennis P. Walsh, Member

R. Alexander Acosta, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Lyn Buckley* and *Anne Peressin, Esqs*., for the General Counsel.
*Michael T. Manley, Esq.,* of Kansas City, Kansas, for the Respondent/Petitioner.
*Robert J. Janowitz* and *Kimberly F. Seten, Esqs.,* of Kansas City, Missouri, for the Charging Party/Employer.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Overland Park, Kansas, on May 7 and 8, 2002, upon the General Counsel's complaint alleging that agents of the Respondent threatened an employee and thus violated Section 8(b)(1)(A) of the National Labor Relations Act, as amended, 29 U.S.C. § 151. This act was also alleged by the Employer to have been objectionable conduct requiring that the election conducted pursuant to the petition in Case 17–RC–12040 be set aside. These matters were consolidated for hearing, along with the challenges to the votes of three individuals.

Upon the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I make the following

[1] The Charging Party/Employer has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's credibility finding that employee Celeste Michelson did not ask employee Angela Ficken "[w]hat makes you think if you don't support us now, we'll support you then," or any similar question. Accordingly, we do not rely on either the judge's speculative statement that Ficken may have been "helped to remember this event. . .when recounting it to her supervisor," or the judge's finding that Ficken testified to inconsistent versions of the question. Further, we do not rely on the judge's alternative finding, assuming that even if Michelson uttered the question, it was not unlawful or objectionable. (See sec. III,B,1 of the judge's decision.)

In adopting the judge's finding that Marsha O'Roark is not a statutory supervisor, we conclude that the Charging Party/Employer failed to meet its necessary evidentiary burden of establishing that she is a supervisor under the Act. In so concluding, we do not rely on the judge's reference to the "degree of discretion" under *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). See sec. III,B,3a of the judge's decision. Finally, we disavow the judge's comparison of O'Roark's job to that of a dispatcher for a taxi or trucking company. Id.

## FINDINGS OF FACT

### I. JURISDICTION

VNA Corporation d/b/a Visiting Nurse Services of Health Midwest (the Employer) is engaged in providing nonacute health care services in the Kansas City area with its principal place of business in Kansas City, Missouri. The Employer annually derives revenues in excess of $250,000 from this business and annually purchases and receives directly from points outside the State of Missouri goods and materials valued in excess of $10,000. I therefore conclude that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

Nurses United for Improved Patient Healthcare, AFT, AFL–CIO (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### *A. The Facts*

This case concerns the bargaining unit status of three individuals and one alleged threat by agents of the Union prior to an election held on February 8, 2002. There had been an organizational campaign by the Union among the Employer's employees beginning in 2000, which also resulted in an election, the results of which were not certified because of alleged objectionable conduct by the Employer. While that matter was pending before the Board, the Union withdrew its petition and filed the petition here.

The Employer has about 100 registered nurses who work out of its facility in Kansas City, Missouri, and a smaller one in Lexington, Missouri. Their principal function is to provide home healthcare to an average daily census of about 900 patients.

Following a hearing on the petition, the Regional Director directed an election in a unit:

> All registered nurses employed by VNA Corporation d/b/a Visiting Nurse Services of Health Midwest providing clinical services or support services for clinical services from its facilities in Kansas City and Lexington, Missouri, including field nurse/case managers, prn field nurses, discharge planners, field visit coordinators, registered nurse after-hours, health promotion nurses, utilization registered nurses, central intake department registered nurses, I.V. coordinator, and performance improvement department registered nurses, excluding all other professional employees, office clerical employees, guards, managers, and supervisors as defined in the Act, and all other employees.

The Employer petitioned the Board for review of this decision contending that the case managers and IV clinical coordinator should be ineligible. The Board concluded, as had the Regional Director, that Marsha O'Roark, the IV coordinator, should be allowed to vote subject to challenge. She did and was. In addition, the Union challenged the vote of Patricia Habinger on grounds she does not share a community interest with other unit employees; and, the Employer challenged Catherine Burrows contending that as the Clinical Systems Analyst she is a manager.

In the early evening of October 24, 2001, shortly after the petition had been filed, Diane Schramm (an organizer for the Union) and Celeste Michelson (an employee out of the Kansas City office) visited the home of Lexington employee Angela Ficken. As Ficken tells it, when she arrived home she was late and in a hurry to take one of her children to a birthday party and not particularly interested in spending time talking to anyone. Schramm and Michelson approached while Ficken was still in her car to discuss the Union. According to Ficken, she said she was not in favor of the Union – that she was happy in her job. Nevertheless, she said she would expect a voice if she was paying dues. Michelson then said "Well what makes you think if you don't support us now, we'll support you then?" This alleged statement by Michelson was denied by Schramm and Michelson.

This statement is alleged by the Employer to have affected the results of the election held 3-1/2 months later and by the General Counsel to have been a threat violative of Section 8(b)(1)(A).

#### *B. Analysis and Concluding Findings*

##### 1. The alleged unfair labor practice

No doubt a union violates Section 8(b)(1)(A) if its agents threaten employees with reprisals for refusing to support the union. *Local Joint Executive Board of Las Vegas,* 323 NLRB 148 (1997). The questions here then are whether the statement attributed to Michelson in fact occurred, and if it did, whether it was such a threat. I conclude no to both.

First, I found Schramm and Michelson more credible in their denials than Ficken. According to all participants at the end of the discussion, Michelson and Schramm asked Ficken for her address and this was readily forthcoming. And, Ficken agreed to a followup meeting. Such is unlikely if in fact Ficken had felt she had been threatened in the manner she claims.

The General Counsel's case is based on the proposition that Ficken should be credited primarily because her testimony was detailed and consistent with what she told fellow employees (and her supervisor) the next day; and, Schramm and Michelson should be discredited because their testimony was vague and contained some internal inconsistencies. I do not accept the General Counsel's argument. The mere fact that Ficken's story was basically consistent from the day after the incident does not really prove that statement was made as alleged. Indeed, it may well be that Ficken was helped to remember this event in the way she did when recounting it to her supervisor.

Beyond that, it is very difficult for one to remember months after the fact the precise words another said. Yet this allegation rises or falls, not on the general substance of what was said, but the precise words attributed to Michelson. Ficken actually testified to two different versions of Michelson's statement: "What makes you think if you don't support us now, we'll support you then?" Later, Ficken began to recite this version: "And the blonde (Michelson) said, what's makes you think if you don't support us now. Or wait. Let me back up and correct myself. She said what—asked me—I'm getting flustered. The very end of the conversation was the fact that the blonde

said if I didn't support them now. They wouldn't support me then." The latter, of course, is much more direct a threat than the former.

Noting the difference between these version, the General Counsel argues that such is not substantive—that Ficken "merely simplified what is a rather cumbersome phrase." That, of course, is precisely the point. If Ficken edited what Michelson told her, then the precision of Ficken's testimony cannot be accepted. Yet whether there was a threat depends, not on the vague substance of what Ficken thought Michelson meant, but on exactly what she said. The difference between these versions casts doubt on the accuracy of Ficken's account. Given Ficken's questionable credibility, I conclude that the General Counsel failed to prove the factual basis for this allegation.

In addition, I conclude that statement recited by Ficken, while borderline, was not a threat of reprisal should Ficken not support the Union. Although the ballot is secret, union supporters would generally know who was in favor and who was not. Thus I do not accept the Union's assertion that there could have been no threat because they could not have known how she voted. Nevertheless, I believe the statement was too ambiguous and isolated to constitute a threat in violation of the Act. Accordingly, I shall recommend that the complaint be dismissed.

2. Report on objections

The tally of ballots shows that of approximately 105 eligible voters, 48 ballots were cast in favor of representation by the Union and 49 opposed. Thus, the three challenged ballots in issue here may be determinative.

The Employer contends that the statement attributed to Michelson 3-1/2 months before the election somehow destroyed the laboratory conditions the Board requires of elections it supervises. Even if I were to find that Michelson in fact made the statement, I would recommend that the objection be overruled. On its face the statement is ambiguous, and it is too isolated and remote in time from the election to have had any probable impact on a bargaining unit of 100 employees.

In addition, as found above, I conclude that Michelson did not make the statement as alleged by Ficken. Accordingly, I will recommend that the Employer's objection to conduct affecting the results of the election be overruled.

3. The challenged ballots

The party challenging the ballot of a voter has the burden proving that the individual is not an eligible voter. *NLRB v. Kentucky River Community Care,* 532 U.S. 706 (2001). In the underlying representational proceeding, the Employer took the position that Marsha O'Roark is a supervisor within the meaning of Section 2(11). In his Decision and Direction of Election, the Regional Director found O'Roark not to be a supervisor. The Employer requested review and the Board concluded that she should vote subject to challenge, meaning that the issue would be resolved only if her vote could affect the outcome of the election. Thus here, the Employer has the burden of proving that O'Roark is a supervisor.

Similarly, the Employer challenged the ballot of Catherine Burrows on grounds that she is a managerial employee and thus ineligible. Again, the Employer has the burden of proof to establish that she is ineligible.

The Union challenged the ballot of Patricia Habinger contending that she lacks a sufficient community of interest with bargaining unit employees to be eligible. The Union has the burden on this issue.

*a. Marsha O'Roark*

O'Roark has been the IV clinical coordinator since 1995. The Employer argues that she is a supervisor because she assigns patients needing IV therapy to the field nurses/case managers (the line employees who deliver the appropriate health care to the Employer's clients). The Regional Director concluded that the evidence of her alleged supervisory status was insufficient to exclude her from voting. On petition for review, the Board ordered that she be allowed to vote a challenged ballot. The evidence here does not add significantly to the record considered by the Regional Director and I conclude that the Employer failed to prove that O'Roark actually performs duties which would bring her within Section 2(11).

O'Roark testified that in performing this function she relies primarily on the geographical proximity of the case manager to the patient and the case manager's work load. While she will occasionally consider a case manager's particular expertise, basically, according to her credible testimony, she considers all registered nurses to be equally competent (a matter not contested by the Employer).

The Employer failed to demonstrate that O'Roark's assignment of case managers is anything other than routine in nature. I cannot conclude that she actually exercises independent judgment in making this assignment. Given the Employer's daily average patient load of 900, someone must direct traffic. And such is O'Roark's principal function but making these assignments is essentially routine. The "degree of discretion" which O'Roark exercises is simply too minimal for her to be considered a supervisor. Cf. *NLRB v. Kentucky River Community Care*, supra. O'Roark's job is analogous to that of a dispatcher for a taxi or trucking company who, absent exercising some supervisory function over the employees dispatched, are not considered by the Board to be statutory supervisors. E.g., *Spector Freight Systems,* 216 NLRB 551 (1975). Unquestionably, O'Roark does not in any manner direct the work of the case managers.

The Employer also contends that O'Roark regularly substitutes for the clinical manager. However, the record shows that such substitutions, on weekends and evenings, is limited and sporadic. I conclude that this factor is insufficient to establish that she is a supervisor. *Cannonsburg General Hospital Assn.,* 244 NLRB 899 (1979).

The Employer asserts, without supporting evidence, that she is paid $6000 to $8000 more than rank-and-file nurses, a fact which, if true would suggest that she is a supervisor. However, I find no evidence of her salary or how much higher it might be than the IV nurses.

Indicating that she is an employee is the fact that in 1996, after being employed as the IV coordinator, O'Roark earned an employee of the year award—an award for which supervisors are not eligible. While her duties could have changed in the

intervening time, to include supervisory authority, there is no evidence they did. On balance, it appears that in her present position and predating the organizational campaign, O'Roark has been treated by the Employer as a rank-and-file employee.

On the totality of the record, I conclude that the Employer did not prove that O'Roark's position is one within the meaning of Section 2(11) of the Act. Accordingly, I shall recommend that the challenge to her ballot be overruled.

*b. Catherine Burrows*

As noted, the Employer contends that Catherine Burrows is a management employee and thus ineligible. Unlike supervisors, management employees are not excluded by statute; however, the Board has long excluded them for essentially the same policy reasons that Congress excluded supervisors—to insure that they do not divide their loyalty between the company and the union. The issue is whether Burrows is such a management employee. I conclude not.

Burrows is an RN who also has a master's degree in information systems. In 2000, the Employer created the position of clinical systems coordinator for which Burrows applied and was hired. The clinical systems coordinator was to be in charge of developing procedures and implementing software so that the Employer's paper recordkeeping could be transferred to computers. Thus one requirement for the job was a computer related degree, such as the one Burrows has.

In the course of performing this job, Burrows suggested to her supervisor that a task force be created. This was done, with Burrows as the chair. However, this is not particularly relevant since other employees from time to time serve on task forces. She, presumably with the task force's input, evaluated the initial software program and found it insufficient for the Employer's needs. Thus at the time of the hearing, search for another program was underway. And she will formulate policies and procedures in connection with the use of laptops and whatever software the Employer finally adopts. This drafting of policy is not substantively different from, for instance, IV nurses recommending changes in IV procedures.

She recommended and the Employer's board of directors approved for purchase laptop computers for the case nurses. She attends bimonthly supervisor meetings, and she is paid by the hour at a rate near (but not more than) the top rate for bargaining unit employees. Nor does she share in the supervisor/manager benefits package.

Unquestionably Burrows performs a job different from rank-and-file nurses and one for which they would not have the objective qualifications. However, whether such is sufficient to exclude her from the bargaining unit on grounds that she is a member of management is another matter. There is a distinction between management employees—who set and direct the employer's business; and professional employees—who bring a high level of expertise to their work and who make judgments in the course of their work, but who nevertheless perform assigned duties. In determining whether an employee is included as a professional or excluded as management, the question is whether or not those alleged to be management "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 288 (1974).

In *NLRB v. Yeshiva University,* 444 U.S. 672, 690 (1980), the Court held that being a professional is not sufficient to establish that an employee is management. To be aligned with management, the employee's duties must be "outside the scope of duties routinely performed by a similarly situated professional."

The evidence here fails to establish that Burrow's duties involve anything more than using her computer expertise in helping develop and implement soft-wear programs for the Employer. There is nothing in the record to suggest that she makes independent decisions involving management policy concerning the Employer's business—namely, health care delivery. Her recommendations involve bookkeeping. Such is essentially a routine function for a computer specialist.

Accordingly, I conclude that Burrows is not a management employee and that the Employer's challenge to her ballot should be overruled.

*c. Patricia Habiger*

Patricia Habiger worked more than 20 years as the Employer's director of regulatory affairs, and as such was a supervisor and a member of management. On February 28, 2001, she retired in order, she testified, to spend time traveling with her husband. And in the year of her retirement, she has done so. However, she has also continued to work on a parttime basis as job performance improvement RN. She typically works 1 day a week, however, she is apparently on call to work other times.

The Union acknowledges that Habiger is an employee and worked sufficient hours to be eligible. There is also no question that her job classification is one specifically included in the unit found appropriate. Indeed, there are full-time employees who work in this classification.

Nevertheless, the Union contends that her ballot should not be counted because she lacks a community of interest with other unit employees. This assertion is apparently based on the fact that she works part time and can take off when she pleases and that she was a member of management for some 20 years. I reject the Union's argument.

While she may be biased in favor of management (given her history) she is unquestionably now a rank-and-file employee. There is no Board law of which I am aware which renders one ineligible to vote based on previous status as a supervisor or manager.

The community-of-interest cases cited by the Union (and the Employer) are not in point since they deal with the scope of the bargaining unit and not the eligibility of an individual employee.

Though she does not work a regular schedule, and can take off whenever she pleases, Habiger is clearly more than a mere casual employee. She works regularly, if not every week. Thus she has a continued expectation of employment. She does the same work as other employees in her classification. In short, she has a substantial interest in the working conditions offered by the Employer. She is, I conclude, eligible to vote

and that the Union's challenge to her ballot should be overruled.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The complaint in Case 17–CB–5596 is dismissed.

The Employer's objections to conduct affecting the results of the election conducted in Case 17–RC–12040 are overruled.

The challenges to the ballots of Marsha O'Roark, Catherine Burrows, and Patricia Habiger in Case 17–RC–12040 are overruled.

Case 17–RC–12040 is remanded to the Regional Director for Region 17 to open and count the ballots of the above-named employees and to certify the results of the election.

Dated, San Francisco, California July 25, 2002

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.